GODFREY PHILIPS (MALAYSIA) SDN BHD

v.

TIMBALAN KETUA PENGARAH KESIHATAN (KESIHATAN AWAM), KEMENTERIAN KESIHATAN, MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2(4)-25-42-2010]
11 JANUARY 2011

ADMINISTRATIVE LAW: *Judicial review - Certiorari and mandamus - Decision of respondent refusing to recognise applicant's declaration of retail selling price of new tobacco product and stating proposed action to be taken - Applicant's declaration of retail selling price made pursuant to requirements of reg. 8A(1)(b) Control of Tobacco Product Regulations 2004 - Whether arguable case for grant of leave - Stay and prohibition orders to prevent respondent from taking proposed action pending judicial review - Whether special circumstances shown - Whether potential harm to public outweighed potential loss and damage to applicant - Rules of the High Court 1980, O. 53*

CIVIL PROCEDURE: *Judicial review - Stay pending judicial review - Stay to prevent respondent from taking proposed action pending judicial review - Special circumstances - Whether shown for grant of stay - Potential harm to public - Whether outweighed potential loss and damage to applicant - Rules of the High Court 1980, O. 53*

The respondent, in a decision dated 21 January 2010, refused to accept nor approve the applicant's declaration of the retail selling price of its new tobacco product which was made pursuant to reg. 8A(1)(b) of the Control of Tobacco Product Regulations 2004. The respondent set out its proposed action against the applicant which, amongst others, was to withdraw the new product or face legal consequences. The applicant now applied for leave for judicial review, *inter alia*, for orders of *certiorari* and *mandamus* to quash the respondent's decision and to direct the respondent to recognise and give effect to its said declaration. The applicant also applied for stay and/or prohibition orders of the respondent's proposed action pending the disposal of the judicial review.

Held (allowing application except prayers for stay and/or prohibition orders):

(1) A decision made by an officer or Minister of the Crown and other relevant decision-making bodies could be stayed by an order of the court pending judicial review of the said decision *(YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor)*. In order to obtain the stay and to restrain and/or prohibit the respondent from acting on its decision, the applicant must establish that it was likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equity tips in its favour and that a stay and/or prohibition order was in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant. (paras 21, 22 & 29)

(2) The likelihood of harm to the public's health stemming from smoking was not disputed by the applicant. The harm to the public's health was irreparable. The harm, by its nature could seldom be adequately remedied by money damages and was often permanent or at least of long duration, *ie*, irreparable. If such harm was sufficiently likely, the balance of harm would usually favour the refusal of a stay order and/or prohibition order to protect the public. (para 30)

(3) The applicant's claim that it would suffer severe losses, damages and loss of reputation did not outweigh the potential irreparable harm to the public's health. Public interest in protecting the public's health and avoiding irreparable harm outweighed economic concerns even in cases where applicants were likely to succeed on the merits of its underlying claim. (para 31)

(4) The grant of leave was based on whether there was an arguable case. A stay order and/or prohibition order might not be appropriate in all cases where leave was granted. Therefore, the balance of convenience dictated that the applicant must obey the respondent's decision pending the outcome of the court's determination on judicial review. If the respondent's decision was eventually quashed, it need no longer be complied with, but until that time, it must be respected and the court would not enjoin its enforcement. (paras 35 & 37)

Case(s) referred to:
American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Attorney General of Canada v. Fishing Vessels Owners Association of BC [1985] 1 FC 791 ***(refd)***
Films Rover International Ltd v. Cannon Films Sales Ltd [1987] 1 WLR 670 ***(refd)***
Inland Revenue Commissioners v. National Federation of Self-employed & Small Businesses Ltd [1982] AC 617 ***(refd)***
R v. Secretary of State for Education and Science, ex parte Avon County Council [1991] 1 All ER 282 ***(refd)***
R v. Secretary of State for the Home Department Ex-p Chebalat [1991] 1 WLR 890 ***(refd)***
Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA ***(refd)***
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Legislation referred to:
Control of Tobacco Product (Amendment) (No 2) Regulations 2009, reg. 3
Control of Tobacco Product Regulations 2004, regs. 7, 8A(1)(b), 8B
Criminal Procedure Code, s. 376
Federal Constitution, art. 145(3)
Rules of the High Court 1980, O. 53 r. 3(5)

Other source(s) referred to:
The Supreme Court Practice, 1995, Vol 1, Pt Q, p 863, para 3/1-14/27

For the applicant - Muhammad Faisal Moideen (Hadi Mukhlis with him); M/s Shook Lin & Bok
For the respondent - Najwa Bustamam FC

Reported by Usha Thiagarajah

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] The applicant seeks leave of the court for the following orders:

(a) an order of *certiorari* to move into this Honourable Court for the purposes of quashing the decision of the respondent dated 21 January 2010 which, *inter alia*, refuses the applicant's

declaration of 18 January 2010, (pursuant to reg. 8A(1)(b) of the Control of Tobacco Product Regulations 2004, as amended by the Control of Tobacco Product (Amendment) (No. 2) Regulations 2009) of the retail selling price for their new tobacco product (ie, the L&M 21's tobacco product);

(b) an order of *mandamus* directed at the respondent to recognize and give effect to the applicant's declaration of 18 January 2010 (pursuant to reg. 8A(1)(b) of the Control of Tobacco Product Regulations 2004, as amended by the Control of Tobacco Product (Amendment) (No. 2) Regulations 2009) of the retail selling price for their new tobacco product (ie, the L&M 21's tobacco product);

(c) an Order of Prohibition to restrain and/or prohibit the respondent from acting on the decision dated 21 January 2010 which, *inter alia*, refuses the applicant's declaration of 18 January 2010 (pursuant to reg. 8A(1)(b) of the Control of Tobacco Product Regulations 2004, as amended by the Control of Tobacco Product (Amendment) (No. 2) Regulations 2009) of the retail selling price for their new tobacco product (ie, the L&M 21's tobacco product);

(d) that there be a stay of the respondent's decision dated 21 January 2010 which, *inter alia*, refuses the appellant's declaration of 18 January 2010 (pursuant to reg. 8A(1)(b) of the Control of Tobacco Product Regulations 2004, as amended by the Control of Tobacco Product (Amendment) (No. 2) Regulations 2009) of the retail selling price for their new tobacco product (ie, for L&M 21's tobacco product);

(e) all other necessary and consequential orders or directions, as deemed fit by this Honourable Court; and

(f) costs of and incidental to this application be costs in the cause.

[2] On 2 September 2010, leave was granted for prayers (a), (b) and (f). Prayers (c) and (d) were refused. The applicant dissatisfied with the order of refusal of prayers (c) and (d).

Facts Of The Case

[3] A brief discussion of the relevant facts is necessary to place this application into proper context.

[4] On 14 July 2009, the applicant decided to introduce a new line of tobacco products ie, the L&M 21's tobacco products.

[5] The applicant submitted an application to the respondent for packaging and labeling approval (per "The Guidelines on Labeling and Graphic Health Warning") dated 29 August 2008 issued by the Ministry of Health under the said Regulations as amended by the Control of Tobacco Product (Amendment) Regulations 2008 on 8 October 2009. The respondent approved the said application on 21 October 2009.

[6] Next, the applicant was informed by the Minister of Health, *vide* his letter dated 21 December 2009 that there was to be fresh amendments to the said regulations ie, by way of the said Control of Tobacco Product (Amendment) (No. 2) Regulations 2009 which, *inter alia*, required the applicant to submit in a written declaration of their retail selling prices for each of their tobacco products, including their new tobacco products.

[7] The amendments to the said regulations came into effect on 1 January 2010.

[8] On 18 January 2010, the applicant had made the requisite written declaration of the recommended retail selling price of RM7.80 for their new tobacco products (which were to be introduced) namely L&M 21's Menthol Flip Top Box King Size Regular, L&M 21's Red Flip Top Box King Size Regular and L&M 21's Blue Flip Top Box King Regular (ie, the said L&M 21's tobacco products) to the respondent.

[9] The declaration of the recommended retail selling price of the said new tobacco products above was made pursuant to the requirements of reg. 8A(1)(b) of the said regulations.

[10] Subsequently, the applicant officially introduced their new tobacco product (on 19 January 2010).

[11] By its letter of 21 January 2010, the respondent purported neither to accept nor approve the applicant's declaration of 18 January 2010. (The Impugned Decision).

[12] The basis of the respondent's decision is found at para 4 of its letter, which reads as follows:

> The Ministry of Health would like to remind you of *the directive of the Honourable Minister of Health to your company vide its letter (12) KKM-171/BKP/08/38/560 dated 10 November 2008 which had stipulated that the retail selling price for a particular tobacco product in the same series, in this case, the tobacco product brand L&M, CANNOT be fixed for the same price of a different sized packet, ie, a packet of 20 sticks priced at RM7.80 and a packet of 21 sticks at the same price of RM7.80 too.* The determination of the retail selling price for a packet with more than 20 sticks should be determined based on the price of a single stick of cigarette in a packet of 20 sticks, of the same cigarette type. This principle is in accordance with the method of determining the minimum price for a packet of cigarette containing less than 20 sticks. For example for this particular product, the price for a single cigarette for the cigarette L&M 20 sticks packet is RM0.39, therefore the retail selling price for the cigarette L&M 21 sticks is RM0.39 multiplied with 21, which is RM8.20. (emphasis added)

[13] The respondent went on to set out its proposed action against the applicant:

> The Ministry of Health is disappointed with the action of Godfrey Phillips (M) Sdn Bhd promoting this product to defeat the efforts of the Government in controlling the promoting of cigarette prices. You are hereby given **STRICT WARNING** to **WITHDRAW** all L&M products, 21 stick packets in market, to change and declare the retail selling price of the tobacco product with the appropriate price that is RM8.20 on an **IMMEDIATE** basis. Failure on your part to comply with these direction is in contravention of Regulation 8B of the Control of Tobacco Product (Amendment) (No. 2) Regulations 2009 and Regulation 7 of the Control of Tobacco Product Regulations 2004, the Ministry of Health Malaysia will take legal action against you in respect of this matter and will also take any further stringent action to control any attempt against the dangerous threat of smoking. (emphasis added)

[14] The applicant alleged that the respondent had committed errors of law that vitiates the respondent's decision of 21 January 2010.

Findings Of The Court

[15] The court is not concerned with the merits of the grounds of challenge at leave stage.

[16] The applicant submits that a stay of the Impugned Decision made by the respondent is necessary pending the final disposal of the intended substantive application so as to preserve the merits and/or integrity of the instant application. According to the applicant, there exist special circumstances that would warrant the applicant's application for a stay of execution of the Impugned Decision.

[17] The applicant further submits that if the stay is not granted, the respondent would be able to execute its Impugned Decision of 12 January 2010 and purport to resort to the sanctions stipulated under regs. 7 and 8B of the said regulations. This may expose the applicant to punishment under the said regulation. In addition, the Impugned Decision would also cause the applicant to suffer from severe losses and damages as well as a loss of reputation.

[18] Learned Senior Federal Counsel who appeared on behalf of Attorney-General's Chambers submits that there is no reasonable excuse why the respondents should be refrained from carrying out their responsibilities, especially to protect the public's health against the dangerous threat of smoking.

[19] Concerning the issue that the applicant may be exposed to punishment if the respondents decide to resort to the sanctions stipulated under regs. 7 and 8B of the said regulation, learned Senior Federal Counsel contends that the court should not interfere with the enforcement matters which are within the province of the respondents and into which the law imposes upon them the duty to enforce.

[20] According to learned Senior Federal Counsel, it should be noted that in the realm of administration of criminal justice in Malaysia, the approach is two pronged, ie, investigation of crimes and the prosecution of criminal cases in court. The investigation of crime is the responsibility of the enforcement agency whilst the prosecution is solely in the hands of Attorney-General, who has the power exercisable at his discretion to institute, conduct or discontinue any criminal proceedings. (see art. 145(3) of the Federal Constitution and s. 376 of the Criminal Procedure Code). Nevertheless, the discretion by the Attorney-General can only be exercised based on the outcome of the investigation undertaken by the relevant enforcement agency. Upon receipt of the result of

A investigation from enforcement agency, the Attorney-General will decide whether to institute prosecution against a perpetrator of crime. If the investigation reveals insufficient evidence to prosecute the suspect, the Attorney-General will choose not to prosecute. The decision to prosecute is solely legal, with public interest as the
B paramount consideration. Therefore, it is purely speculative at this stage to say that the sanction stipulated under regs. 7 and 8B of the said regulations would be resorted to against the applicant.

[21] Order 53 r. 3(5) RHC 1980 provides that the grant of leave
C under this rule, shall not, unless the judge so directs, operates as a stay of the proceedings in question. In *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210, the High Court held as follows:

> D The phrase 'a stay of the proceedings' must have a wider application. It does not confine to proceedings in a court only. Today, many applications for judicial review are for orders of *certiorari* to quash decisions of decision making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the
> E phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself'. *R v. Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 All ER 282.

F **[22]** It is plain that a decision made by an officer or Minister of the Crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court, pending the conclusion of a challenge to the decision-making process by way of judicial review. In directing a stay of development plans on land
G of the 2nd respondent pending the outcome of the substantive motion for *certiorari*, the court held that the object of granting a stay is to ensure that the applicant's substantive motion for judicial review would not be rendered nugatory in the event the applicants do succeed in this application.

H

[23] In summary, the High Court has jurisdiction, where appropriate to stay the decision making process [if this has not been completed] the decision itself and its implementation (*The Supreme Court Practice*, 1995, Vol 1, Pt Q at p. 863 para 3/1-14/
I 27 (refer p. of BOA p. 474).

[24] In *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85, the Court of Appeal when discussing the difference between an injunction and an order of stay, said: A

> In the context of Order 53 r. 1(5), an order of stay has the effect of temporarily suspending **the effect** of a public law decision pending the outcome of *certiorari* or prohibition proceedings brought to challenge the validity of the **particular decision**. (emphasis added) B

[25] Thus, what the applicant in reality is seeking is a stay of the operation of the 1st respondent's decision which is being impugned and constitutes the subject matter of the reliefs sought in this judicial review proceedings pending the disposal of this application. C

[26] The above case also highlights the distinction between an interim stay order and a quashing order. A stay means that the decisions which have been stayed would not be operative from the date of the passing of the stay order; it does not mean that the said order has been wiped out from existence which is the effect of the quashing of a decision. D E

[27] In *R v. Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 All ER 282 the English Court of Appeal held that the grant of a stay would not nullify the statutory provisions under which the order was made but would merely have the effect of deferring the date for the implementation of the proposals until the judicial review proceedings were concluded. The court had jurisdiction to grant a stay of the implementation of the Secretary of State's decision and the proposal for the school to be grant-maintained. In that case, Glidewell LJ described a stay in the following terms: F G

> An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. H

[28] It must be noted that a stay of the proceedings as in a suspension of a unilateral *ex parte* decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full blown trial and a determination on the merits have been made *inter partes*. An attempt to equate the two processes would be inappropriate. I

[29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the 1st respondent from acting on the Impugned Decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant.

[30] The likelihood of harm to the public's health stemming from smoking is not disputed by the applicant. The harm to the public's health is irreparable. The harm, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, ie, irreparable. If such harm is sufficiently likely, therefore, the balance of harms will usually favour the refusal of a stay and/or prohibition orders to protect the public.

[31] The applicant's severe losses and damages as well as a loss of reputation did not outweigh the potential irreparable harm to the public's health. Public interest in protecting the public's health and avoiding irreparable harm outweighs economic concerns even in cases where applicants were likely to succeed on the merits of their underlying claim.

[32] In *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396, speaking in the context of interim injunction, Lord Goff said:

> So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority or to render it just or convenient to restrain the authority for the time being from … the law.

[33] In *Films Rover International Ltd v. Cannon Films Sales Ltd* [1987] 1 WLR 670, Hoffman J (as he then was) said at p. 680:

> the principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right

> at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds or would succeed at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

[34] In the case of *Smith v. Inner London Education Authority* [1978] 1 All ER 411, Lord Denning at p. 422 said:

> … I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interest of the public in general to whom these duties are owned.

[35] The Court accepts that the applicant's application for order of *certiorari* and *mandamus* were arguable and therefore leave was granted. However, in this context, the court must bear in mind what Lord Diplock said in *Inland Revenue Commissioners v. National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

[36] It was stated in *R v. Secretary of State for the Home Department Ex-p Chebalat* [1991] 1 WLR 890:

> The requirement that leave be obtained before a substantive application can be made for relief by way of judicial review is designed to operate as filter to exclude cases which are unarguable. Accordingly, an application for leave is normally dealt with on the basis of summary submissions. If an arguable point emerges, leave is granted and extended arguments ensures upon the hearing of the substantive application.

[37] In relation to whether there is an arguable case, the grant of leave is a starting point but it is by no means that the stay and/or prohibition order will be appropriate in all cases in which leave has been granted. Therefore, the balance of convenience dictates that the applicant who challenges the decision of the public body must obey the Impugned Decision pending the court's decision. If the Impugned Decision is eventually quashed then it need no longer be complied with, but until that time, it must be respected and the court will not enjoin its enforcement. Further in the case of *Attorney General of Canada v. Fishing Vessels Owners Association of BC* [1985] 1 FC 791 it was said:

> When a public authority is prevented from exercising its statutory powers, it can be said in a case like the instant one, the public interest of which that authority is the guardian suffers irreparable harm.

Conclusion

[38] In the circumstances and by reasons of the foregoing, the court allowed prayers (a), (b) and (f) but refused to grant prayers (c) and (d). The court is not persuaded that there are special circumstances which would justify the grant of the said prayers (c) and (d).